

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC EMPLOYEE RETIREMENT ASSOCIATION

In the Matter of the Denial of Application  
for Disability Benefits in the Coordinated  
Plan for Larry Jensen

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter was heard by Administrative Law Judge (ALJ) Richard C. Luis on July 31 and August 8, 2012, in Mankato and St. Paul, respectively. Rory H. Foley, Assistant Attorney General, appeared for the staff of the Public Employee Retirement Association (PERA). Kenneth R. White, Esq., appeared for Larry Jensen (Appellant, Jensen). The OAH record closed on November 13, 2012.

**STATEMENT OF THE ISSUE**

1. Whether Larry Jensen is eligible for PERA Disability Benefits because he is totally and permanently disabled within the meaning of Minn. Stat. § 353.01, subd. 19?

Based on the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Larry Jensen is a 58-year-old resident of Omaha, Nebraska, who formerly worked for the City of Mankato Street Maintenance Department.<sup>1</sup> Jensen started as a City employee on January 19, 1981 and continued until May 21, 2011.<sup>2</sup>

2. Jensen graduated from New Ulm High School in 1973 and later attended Mankato State University where he obtained a Bachelor of Science degree in teaching and a minor in history. His major was K-12 physical education and he wanted to teach at the high school level. Jensen played two years as a pitcher for the Cincinnati Reds professional baseball organization in its minor league system.<sup>3</sup>

3. Jensen started teaching for the Golden Valley school district in the fall of 1979.<sup>4</sup> In 1980, the school district merged with the Hopkins School District and he was

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<sup>1</sup> Jensen and his wife moved to Omaha, Nebraska two weeks following the August 8, 2012 hearing date.

<sup>2</sup> Exhibit ("Ex.") 6.

<sup>3</sup> Testimony of Larry Jensen.

<sup>4</sup> *Id.*

laid off.<sup>5</sup> Jensen subsequently obtained a job as a Department of Public Works Streets Technician with the City of Mankato Street Department.<sup>6</sup> Jensen continued to work for the City of Mankato continuously for the next 32 years.<sup>7</sup> He had intended to work until July 31, 2012, when he would qualify for a Rule of 90 retirement from PERA.<sup>8,9</sup>

4. Jensen sustained a series of work-related and non-work related injuries over the course of his working career with the City of Mankato. In 1975 he broke his wrist and had it surgically repaired; he had right knee surgery in 1976; he tore the cartilage in his right knee playing volleyball in 1980; he had a sciatic nerve injury in 1984; in 1990 he had a neck fusion surgery; in 1996 he had left knee surgery to repair torn cartilage; and in 1999 he had a second surgery on his right knee.<sup>10</sup>

5. Jensen applied for PERA Coordinated Plan Total and Permanent Disability benefits on September 12, 2011.<sup>11</sup> He cited his neck surgeries; a ruptured disc in his low back; surgeries to his right elbow and right shoulder; two knee surgeries; and degenerative bone disease as the basis for his claim.<sup>12</sup> In support of his claim, Jensen attached a PERA Medical Report form completed by Gene Swanson, M.D., dated September 7, 2011.<sup>13</sup>

6. Dr. Swanson first examined Jensen on April 23, 2009 and thereafter, on May 14, 2009 and December 16, 2010.<sup>14</sup> Dr. Swanson diagnosed Jensen with “Radiculitis Cervical Spine; Displacement of Cervical Intervertebral disc without myelopathy; and spondylosis Cervical.”<sup>15,16</sup> Dr. Swanson placed Jensen on permanent work restrictions, including “no lifting/carrying more than 11-20 lbs.; no pushing/pulling 0-25 lbs.; no overhead reaching, twisting/turning 1-3 hrs, kneeling/squatting 1-3 hrs, sitting 4-6 hours, standing/walking 4-6 hrs, no ladder climbing/ stair climbing.”<sup>17</sup>

7. Dr. Swanson did not expect further improvement in Jensen’s condition, nor did he anticipate the need for further medical treatment.<sup>18</sup> He opined that Jensen

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; Ex. 6.

<sup>7</sup> *Id.*

<sup>8</sup> Minn. Stat. § 353.30, subd. 1a (2010).

<sup>9</sup> *Id.*

<sup>10</sup> Test. of L. Jensen.

<sup>11</sup> Ex. 1.

<sup>12</sup> *Id.*

<sup>13</sup> Ex. 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Radiculitis is defined: “inflammation of the root of a spinal nerve, especially of that portion of the root which lies between the spinal cord and the intervertebral canal.” *Dorland’s Illustrated Medical Dictionary*, 28th Ed. p. 1404 (1994). Intervertebral is defined as: “situated between two contiguous vertebrae.” *Id.*, p. 852. Myelopathy is defined: “a general term denoting functional disturbances and/or pathological changes in the spinal cord; the term is often used to designate non-specific lesions, in contrast to inflammatory lesions.” *Id.* at 1090. Cervical myelopathy is defined: “compression myelopathy of the cervical spinal cord, a complication that occasionally arises from rheumatoid arthritis or osteoarthritis.” *Id.*

<sup>17</sup> Ex. 2, Reports of Work Ability dated December 16, 2010 and June 28, 2011.

<sup>18</sup> Ex. 2.

was totally and permanently disabled from substantial gainful activity for a period expected to last at least one year pursuant to the definition of total and permanent disability set forth in Minn. Stat. § 353.01, subd. 19 (2010).<sup>19</sup>

8. Jensen also submitted a PERA Medical Report form completed by Steven Curtis, M.D., dated August 23, 2011 in support of his application.<sup>20</sup> Dr. Curtis first examined Jensen on December 10, 2010 and thereafter, on June 28, 2011.<sup>21</sup> Dr. Curtis diagnosed Jensen with “rotator cuff tear R shoulder.”<sup>22</sup> Dr. Curtis performed a rotator cuff repair on January 6, 2011 and prescribed post-operative physical therapy.<sup>23</sup> Dr. Curtis indicated that Jensen had “regained good range of motion and shoulder strength, but his tear was large and he should avoid shoulder intensive activities.”<sup>24</sup> Dr. Curtis anticipated that Jensen might continue to gain strength and endurance with time.<sup>25</sup> He opined that Jensen was not totally and permanently disabled from substantial gainful activity for a period expected to last at least one year.<sup>26</sup>

9. Jensen submitted a Medical Report form completed by Dr. Swanson dated September 7, 2011.<sup>27</sup> Dr. Swanson noted that Jensen had been placed on permanent restrictions, no further improvement in Jensen’s condition was expected and there was no need for further treatment. Although Dr. Swanson opined that Jensen was totally and permanently disabled, he stated that Jensen was able to work with the permanent restrictions set forth on an attached Report of Work Ability form.<sup>28</sup>

10. The City of Mankato submitted an Employer’s Certification By Governmental Unit Regarding Disability dated October 13, 2011 to PERA.<sup>29</sup> The City indicated that Jensen’s dates of employment were from January 1, 1981 to May 21, 2011. The City also indicated that Jensen had been injured as a direct result of his employment and that he had applied for workers’ compensation benefits.<sup>30</sup>

11. PERA forwarded Jensen’s medical reports to Jared A. Frazin, M.D., its medical advisor at the Minnesota Department of Health, for a determination of whether Jensen was totally and permanently disabled.<sup>31</sup> In his October 21, 2011 report, Dr. Frazin opined that Jensen was not totally and permanently disabled and that his application should be denied.<sup>32</sup> Dr. Frazin noted that while Dr. Swanson had opined that Jensen was totally and permanently disabled, he also indicated that Jensen could

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<sup>19</sup> Ex. 2.

<sup>20</sup> Ex. 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see Minn. Stat. § 353.01, subd. 19 (2010).

<sup>27</sup> Ex. 5.

<sup>28</sup> *Id.*

<sup>29</sup> Ex. 6.

<sup>30</sup> *Id.*

<sup>31</sup> Test. of Lance LaFrombois; see Minn. Stat. § 353.031, subd. 5 (2010).

<sup>32</sup> Ex. 7.

work with permanent restrictions effective December 16, 2010. Dr. Frazin also noted that Dr. Curtis had opined that Jensen was not totally and permanently disabled from engaging in substantial gainful activity.<sup>33</sup>

12. PERA then received a Medical Report from James Miller, M.D., dated October 7, 2011.<sup>34</sup> Dr. Miller had examined Jensen on June 3, 2009 and most recently on December 30, 2010. Dr. Miller referenced a December 8, 2010 EMG report he asserted was attached to the Medical Report form.<sup>35</sup> The EMG report, however, was not attached.<sup>36</sup> Dr. Miller noted that Jensen's neck and shoulder pain had improved since his surgery. Dr. Miller indicated that Jensen "still had loss of motion in cervical spine." He noted persistent numbness in Jensen's right hand. Finally, Dr. Miller noted that Jensen had not shown "meaningful improvement in chronic low back pain." Dr. Miller opined that Jensen was totally and permanently disabled from substantial gainful activity for a period expected to last at least one year.<sup>37</sup>

13. PERA forwarded Dr. Miller's October 7, 2011 Medical Report to the Minnesota Department of Health Medical Advisor.<sup>38</sup> On November 29, 2011 PERA received another report from Dr. Frazin, who opined that Jensen was not totally and permanently disabled and that his application should be denied.<sup>39</sup> Dr. Frazin noted that he had previously reviewed Jensen's case on October 21, 2011, and that Dr. Miller's report was eleven months old at the time it was submitted and was missing the documents purportedly attached.<sup>40</sup> In addition, Dr. Miller did not list any diagnosis for Jensen on the report form. Dr. Frazin recommended that Jensen be referred for an orthopedic independent medical examination before he could render an opinion.<sup>41</sup>

14. On December 5, 2011, Jensen faxed PERA the documents that had been missing from Dr. Swanson's original medical report.<sup>42</sup> The documents were the December 6, 2010 Report of Work Ability indicating that Jensen could return to work effective December 16, 2010 with the permanent restrictions indicated and an enclosure from the Orthopaedic & Fracture Clinic that had been omitted from Dr. Swanson's report. The Clinic's chart note indicates that Jensen is "quite stable. He is status post multiple level cervical fusion."<sup>43</sup>

15. PERA forwarded the medical records that had been missing from Dr. Miller's report to Dr. Frazin.<sup>44</sup> Dr. Frazin issued a report on December 29, 2011, stating that the additional records submitted by Jensen were illegible and that he could

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<sup>33</sup> *Id.*

<sup>34</sup> Ex. 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; Test. of Lance LaFrombois.

<sup>37</sup> *Id.*

<sup>38</sup> Test. of L. LaFrombois; Minn. Stat. § 353.031, subd. 5 (2010).

<sup>39</sup> Ex. 9.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Ex. 10.

<sup>43</sup> *Id.*

<sup>44</sup> Test. of L. LaFrombois; Minn. Stat. § 353.031, subd. 5 (2010).

not therefore render another opinion.<sup>45</sup> Dr. Frazin again recommended that an independent orthopedic medical examination be submitted.<sup>46</sup>

16. PERA forwarded Dr. Swanson's December 16, 2010 medical report to Dr. Frazin, who noted that the records from Dr. Swanson were approximately 13 months old.<sup>47</sup> Dr. Frazin indicated that Dr. Swanson had diagnosed Jensen with "radiculitis of the cervical spine and status post cervical arthrodesis." Dr. Frazin further noted that Dr. Swanson's restrictions for Jensen were not included for review. Dr. Frazin recommended that Jensen be referred for an independent orthopedic examination and that the file be placed in the pending category.<sup>48</sup>

17. On February 2, 2010, PERA Claims Administrator Jody Kortus requested that Dr. Frazin issue a medical determination on Jensen's eligibility for total and permanent disability benefits based upon the existing medical records previously provided to him. Dr. Frazin indicated that the best way to "further process this claim therefore, is to ask Mr. Jensen to make an appointment with two medical practitioners and ask them to complete the Medical Report, Basic and Coordinated Plan based on a recent evaluation."<sup>49</sup> He again recommended that Jensen's file be placed in the pending category.<sup>50</sup>

18. On February 15, 2012 PERA notified Jensen that its Medical Advisor had recommended that his claim for total and permanent disability benefits be denied.<sup>51</sup> PERA advised Jensen that he could appeal this denial within 60 days from the notice.<sup>52</sup>

19. On February 23, 2012 Jensen appealed the denial of his total and permanent disability benefit application.<sup>53</sup> Jensen enclosed his doctor's notes and reports; the independent Functional Capacity Evaluation completed by Saunders Physical Therapy;<sup>54</sup> physical therapy reports; QRC assessments; and a copy of his Social Security Disability Award. Jensen also enclosed a self-prepared chronology of his communications with PERA Staff concerning his benefit application.

20. Whenever Mr. Jensen exerts himself, he needs considerable time to recover, including spending his days in bed.<sup>55</sup>

21. PERA also had Jensen evaluated by a Qualified Rehabilitation Consultant ("QRC") to determine whether he is capable of performing any alternative substantial

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<sup>45</sup> Ex. 11.

<sup>46</sup> *Id.*

<sup>47</sup> Ex. 12.

<sup>48</sup> *Id.*

<sup>49</sup> Ex. 13.

<sup>50</sup> *Id.*

<sup>51</sup> Ex. 14.

<sup>52</sup> *Id.*

<sup>53</sup> Ex. 15.

<sup>54</sup> The Saunders Physical Therapy notes and the Social Security Disability Award are part of Ex. 3.

<sup>55</sup> Test. of Terri and Larry Jensen

gainful activity. Jensen submitted to an employability evaluation performed by QRC Crystill Lorenzen.<sup>56</sup>

22. In her March 14, 2012 Employability Evaluation Report ARC, Lorenzen set forth Jensen's social background; education; vocational history; his self-reported reasons for not being able to work at his PERA-covered employment; Jensen's activities of daily living; a physical description; his driver's license; her observations; self-reported medical information; review of information; vocational strengths and weaknesses; vocational opinion and recommendations; labor market survey; and conclusion.<sup>57</sup> Lorenzen concluded and opined that Jensen was not totally and permanently disabled from substantial gainful activity.<sup>58</sup>

23. Lorenzen conducted a labor market survey for Jensen's labor market and identified ten positions that she concluded matched his qualifications and limitations, based upon his education, experience, and physical limitations.<sup>59</sup> In Lorenzen's opinion, these positions constituted substantial gainful activity.<sup>60</sup> The positions identified included:

1. Mankato Area Public Schools-Non-Classroom Paraprofessional in the lunchroom at Eagle Lake Elementary School. The Non-Classroom Paraprofessional position paid \$10.50 per hour for 7.5 hours per week.

2. Mankato Area School District-Early Childhood Special Education Professional at Eagle Lake Elementary School for 6.25 hours per day/five days per week. The wage was not listed.

3. Mankato Area School District-Special Education Paraprofessional at Franklin Elementary School for 6.25 hours per day/five days per week. The wage was not listed.

4. Mankato Area Public Schools-Special Education Paraprofessional at Monroe Elementary School for 6.25 hours per day/five days per week. The wage was not listed.

5. Mankato Area School District-Special Education Paraprofessional at Eagle Lake Elementary School for 6.25 hours per day/five days per week. The wage was not listed.

6. Mankato Area Public Schools-Clerical Assistant Non-classroom Paraprofessional Lunchroom at East Junior High School working 4 hours per day/5 days per week as the Media Resource Center Clerk, and a Lunchroom supervisor position working 1 hour per day/five days per week. The Media

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<sup>56</sup> Ex. 16.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Ex. 16; *Test. of Crystill Lorenzen.*

Resource Center Clerk position paid \$11.10 to \$11.40 per hour. The Lunchroom position paid \$10.50 per hour.

7. Mankato Area Public Schools-Instructional Support Secretary providing instructional support for students at the Services Center. The wage was not listed.

8. Mankato Area Public Schools District-Early Childhood School Readiness Substitute Teaching Assistant. The position required that the individual provide substitute teaching assistance in the Early Childhood School Readiness program. The position had a variety of work hours available and paid \$9.00 per hour.

9. Mankato Area Public Schools-Early Childhood Center Community Ed E-Marketing Secretary. The position required the individual to use the computer and provide support to the Community Education and Recreation Department in marketing its programs. The position paid \$11.00 per hour.

10. Rotech Healthcare-Patient Service Technician Local Delivery Driver. The position required the individual to deliver home medical equipment and respiratory equipment services and medications for home use. The wage was not listed.<sup>61</sup> This job was located in Fairmont, Minnesota, a one-way commute of one hour from Mankato.<sup>62</sup>

24. On April 7, 2012 Jensen wrote Jody Kortus at PERA correcting errors that he noted in Lorenzen's March 14, 2012 employability evaluation report.<sup>63</sup> On April 10, 2012, PERA sent Jensen a notice that the fact-finding conference regarding his Application for Total and Permanent Disability benefits was scheduled for July 31, 2012 in Mankato.<sup>64</sup> On April 11, 2012, PERA forwarded Jensen's April 7, 2012 letter to Stubbe and Associates.<sup>65</sup> On May 16, 2012, QRC Crystill Lorenzen responded to Jensen's April 7, 2012 letter, noting that his criticisms were of mostly inconsequential details.<sup>66</sup>

Based on the Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge and the Board of Trustees of the Public Employees Retirement Association have authority to consider the applicant's entitlement to permanent disability benefits under Minn. Stat. §§ 14.55 and 353.03.

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<sup>61</sup> Ex. 16.

<sup>62</sup> Testimony of Lorenzen.

<sup>63</sup> Ex. 17.

<sup>64</sup> Ex. 18.

<sup>65</sup> Ex. 19.

<sup>66</sup> Ex. 20.

2. The PERA staff gave timely and proper notice of the fact-finding conference and has complied with all procedural requirements.

3. Under Minn. Stat. § 353.01, subd. 19, “Total and permanent disability” means the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to be a long-continued and indefinite duration. Long-continued and indefinite duration means that the disability has been or is expected to be for a period of at least one year.

4. The record shows that Mr. Jensen’s disability is continuing, and his physical condition is worsening.

5. Larry Jensen has established by a preponderance of the evidence that he is unable to engage in substantial gainful activity, and has been unable to do so for a period of more than one year. It is reasonable to conclude that Jensen’s disability will continue for one more year.

Based on the Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

**IT IS RECOMMENDED** that the PERA Board of Trustees **GRANT** Larry Jensen’s application for disability benefits.

Dated: December 13, 2012

s/Richard C. Luis  
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RICHARD C. LUIS  
Administrative Law Judge

Reported: Digitally Recorded

### **NOTICE**

This Report is a recommendation, not a final decision. The Board of Trustees of PERA will make the final decision after reviewing the record. The Board may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Parties should contact the offices of the Public Employees Retirement Association of Minnesota, 60 Empire Drive, Suite 200, St. Paul, Minnesota 55103, to learn how to file objections to this report or present further argument to the Board.

## **MEMORANDUM**

Under Minn. Stat. §353.33, subd. 1, a PERA coordinated plan member who becomes totally and permanently disabled before normal retirement age is entitled to receive a disability benefit. Under those criteria, Larry Jensen should be awarded benefits in this case. The record demonstrates that he meets the statutory definition of “total and permanent disability”.

Mr. Jensen has a physical impairment, as demonstrated by three neck and back surgeries, his right shoulder and right elbow surgeries, numbness of his right hand, and two knee surgeries. The PERA staff concedes that he has a physical impairment which meets the first requirement of the eligibility statute.

Under the standard suggested by the PERA staff, Mr. Jensen must establish that he is incapable of performing the “substantial and material part” of any employment. The Administrative Law Judge is persuaded that Mr. Jensen had established that he meets that standard.

Two physicians, Dr. Gene Swanson, an orthopedic surgeon, and Dr. James Miller, a general practitioner, have documented that Mr. Jensen is totally and permanently disabled. The Staffs’ reliance on a Functional Capacity Assessment,<sup>67</sup> which shows that Mr. Jensen retains some capacity to function, actually establishes extremely severe restrictions in his ability to perform ordinary tasks such as lifting, sitting, standing and most other physical activities. It is significant that Mr. Jensen’s functioning declined noticeably during the second day of testing. As Mr. Jensen argues, the decline in tests results shows that he cannot sustain the kind of effort necessary to work on a regular basis, as his physical capabilities decline when he continues to exert himself.

Mr. Jensen has made a record that shows that his disability is continuing and his physical condition is worsening.

It is noted that Mr. Jensen has applied for and has received Social Security Disability Benefits. While not controlling, the Administrative Law Judge believes such eligibility is a significant factor.

Mr. Jensen’s medical records reveal various injuries that have resulted in restricting his ability to work. He has suffered injuries in every extremity, to his neck (resulting in spinal fusions), to his lower back (resulting in regular and at times debilitating pain), to his right arm (resulting in numbness and shaking), and to his left arm and hand (resulting in symptoms he experiences on his right side).

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<sup>67</sup> PERA Ex. 3.

The evidence that Mr. Jensen spends significant time recovering, including spending entire days in bed, whenever he exerts himself, is uncontradicted and particularly compelling.

The PERA's medical consultant, Dr. Jared Frazin, did not act positively on Mr. Jensen's evidence of total and permanent disability, in large part because the reports from physicians supporting Mr. Jensen's disability were, in his opinion, outdated.<sup>68</sup>

Dr. Frazin recommended to the PERA staff that Mr. Jensen be referred for an independent orthopedic medical examination, but the staff did not inform Mr. Jensen of Dr. Frazin's request. Instead, the staff notified Mr. Jensen that his claim had been denied.<sup>69</sup>

The Administrative Law Judge agrees with Mr. Jensen's argument that the PERA staff has failed to prove that jobs are available within the restrictions placed on his ability to work.

A Qualified Rehabilitation Consultant (QRC), Crystill Lorenzen, concluded that Mr. Jensen is able to participate in substantial gainful activity, and suggested a number of jobs she believed Mr. Jensen could pursue.

Most of the jobs are part-time employment with the Mankato Public Schools. None of them fit within Mr. Jensen's physical and skill restrictions. Several of the positions require computer skills (which Jensen lacks), lifting (a task for which Mr. Jensen is extremely limited), and the physical dexterity and stamina required to work as a classroom aide. It is significant that a classroom aide must be sufficiently physically fit to respond to situations involving unruly children, or emergencies. Given Mr. Jensen's physical restrictions, he cannot respond to many such situations.

The only other employer which had a job possibly fitting Mr. Jensen's restrictions was an enterprise located 51 miles away (in Fairmont), and the job paid an extremely low wage.

Mr. Jensen supplied evidence that he underwent extensive job searches while on workers' compensation and worked with two QRC's in unsuccessful attempts to find him employment. This evidence demonstrates that he has no realistic chance at alternative employment.

In response to testimony from Lance LaFrombois to the effect that "gainful employment" is sufficient to defeat a disability claim if the claimant can work 20 hours per week at minimum wage, Mr. Jensen has established that, given his low level of stamina and need to physically recover after he engages in work, employment efforts by Jensen would be "useless and harmful expenditures of effort" within the meaning of

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<sup>68</sup> PERA Ex. 13.

<sup>69</sup> PERA Ex. 14.

*Blazek v. North American Life and Casualty Company*.<sup>70</sup> That conclusion is supported by un rebutted evidence that Mr. Jensen “pays a price” for any physical activity, that he has “good days and bad days” and that on his bad days he must remain virtually motionless.<sup>71</sup>

The Functional Capacity Assessment of Mr. Jensen<sup>72</sup> supports that evidence, noting both the need to take frequent breaks and positional shifts, and the decline in performance from day one into day two.

As noted above, the PERA staff has failed to establish that employment amounting to “substantial gainful activity” is available in the Mankato labor market for Mr. Jensen.

In its final submission, the PERA staff notes that any lack of job prospects for Mr. Jensen in the vicinity of Mankato is now mitigated by Mr. Jensen’s relocation to Omaha (his spouse has found a job there). The ALJ notes that Omaha has a much larger labor market than Mankato.

Regarding Mr. Jensen’s move to Omaha, the PERA staff notes only that the move to the larger labor market has enhanced his probability of obtaining substantial gainful employment and attached to its final submission<sup>73</sup> examples of programs in the Omaha area to assist individuals with disabilities to return to work. The Administrative Law Judge has discounted the evidence presented in Attachment F because it does not rise to the level of establishing that substantial gainful employment exists, in fact, for Mr. Jensen in the Omaha area, particularly because of the severe physical restrictions regarding any kind of employment that could be performed by Mr. Jensen.

**R. C. L.**

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<sup>70</sup> 87 N.W.2d 36, 34 (1957).

<sup>71</sup> Test. of Terri and Larry Jensen

<sup>72</sup> PERA Ex. 3.

<sup>73</sup> Attachment F to November 13 filing of PERA staff.